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In the Supreme Court of the United States

DAVID A. ZUBIK, *et al.*,
Petitioners,

v.

SYLVIA BURWELL, *et al.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Third, Fifth, Tenth and D.C. Circuits

AMICUS CURIAE BRIEF OF AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONERS

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INTERESTS OF THE *AMICUS CURIAE*[1]

The American Center for Law and Justice ("ACLJ") is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys often appear before this Court as counsel for a party, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993), or for *amici*, *e.g.*, *FCC v. Fox TV*, 132 S. Ct. 2307 (2012); *Hein v. Freedom From Religion Found.*, 551 U.S. 587 (2007).

The ACLJ has been active in litigation concerning the Affordable Care Act ("ACA"), the statute on which Respondents rely to promulgate the regulatory mandate to require employers to cover contraceptive services, including abortion-inducing drugs, sterilization, and related patient education and counseling services in their health insurance plans ("the mandate")—which is at issue here. The ACLJ filed several *amicus curiae* briefs in support of various challenges to provisions of the ACA, *e.g.*, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012), and represented the plaintiffs in their challenge to provisions of the ACA in *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011), *superseded on other grounds by* 132 S. Ct. 2566 (2012).

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[1] The parties in this case have filed blanket letters of consent to the filing of amicus briefs. No counsel for any party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

In addition, the ACLJ has represented numerous closely held corporations and their owners in challenges against the mandate, *e.g.*, *Gilardi v. U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208 (D.C. Cir. 2013), *vacated and remanded*, 134 S. Ct. 2902 (2014), and filed an *amicus curiae* brief with this Court in support of plaintiffs in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). The ACLJ also filed an *amicus curiae* brief in support of the petition for a writ of certiorari filed by the Little Sisters of the Poor Home for the Aged in this case.

This case is gravely important to the future protection of religious freedom in this country and is therefore of special interest to the ACLJ.[2]

SUMMARY OF ARGUMENT

The courts below held that Petitioners' religious beliefs are not substantially burdened under the Religious Freedom Restoration Act, 42 U.S.C. §§2000bb *et seq.*, due to a so-called "accommodation" mechanism established by Respondents. While *Amicus* vehemently disagrees with the lower courts' holdings—which ignore the fact that all of the available options for compliance require objecting parties to take affirmative steps to facilitate the very coverage they object to, *see* ACLJ Amicus Br. at 2-9, *Little Sisters of the Poor Home for the Aged v. Burwell*, No. 15-105 (U.S. Aug. 24, 2015) (cert. stage)—it is also very much concerned by the potentially disastrous ramifications of this Court's decision in this case.

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[2] This brief is also submitted on behalf of more than 77,000 supporters of the ACLJ as an expression of their opposition to the mandate's encroachment on religious civil liberties.

Under Respondents' contraceptive mandate, including the alternate mechanisms for complying with that Mandate, *i.e.*, the "accommodation," Petitioners are required to choose between acting according to their sincerely held religious beliefs or complying with the law. The government, and the lower courts that have adopted the government's legal arguments, have thus forced upon Petitioners a radically unfair dilemma: facilitate the objectionable coverage in violation of their religious beliefs, or pay crippling annual penalties to the government.

Petitioners are all nonprofit religious organizations that seek to carry out their functions consistent with their religious mission. Those Petitioners that provide social services, like the Little Sisters of the Poor, are part of a well-established and integral nonprofit sector that provides vital gap filling social welfare services to needy and vulnerable populations. These organizations also inculcate civic virtues of charity and engagement vital to the success of democratic society. Many of these nonprofits, including those operated by many of the Petitioners, are dependent upon religious organizations for their funding and continued support. While these organizations provide vital services, they provide them in compliance with, and in furtherance of, their sincerely held religious beliefs.

No matter the outcome of this case, Petitioners and their affiliate organizations will continue to act according to their conscience and religious commitments. In so doing, if forced to facilitate the objectionable coverage, Petitioners and their affiliate organizations will be required to pay burdensome fines or take other drastic measures to remain true to their

beliefs. These measures, however, could result in the scaling back, if not dissolution, of their important charitable efforts.

If this Court rules against Petitioners in this case it will leave gaps in our already burdened social welfare system and cripple a vital schoolhouse of civic virtue in our society.

ARGUMENT

The courts below held that Petitioners' religious beliefs, while sincere, are not substantially burdened by the contraceptive mandate due to the so-called "accommodation" mechanism for complying with the mandate.[3] In *East Texas Baptist Univ. v. Burwell*, the Fifth Circuit held that "the acts the Plaintiffs are required to perform do not involve providing or facilitating access to contraceptives, and the plaintiffs have no right under RFRA to challenge the independent conduct of third parties."[4] The other lower courts adopted a similar line of reasoning.[5]

Amicus believes that the courts below are wrong. The acts the Mandate requires of the objecting parties cannot simultaneously be *de minimis* and causally

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[3] *See* 26 C.F.R. § 54.9815-2713A(a); 29 C.F.R. § 2590.715-2713A(a); 45 C.F.R. § 147.131(b).

[4] *East Texas Baptist Univ. v. Burwell*, 793 F.3d 449, 463 (5th Cir. 2015).

[5] *See Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 443 (3d Cir. 2015); *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell*, 794 F.3d 1151, 1220 (10th Cir. 2015); *Priests For Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 237 (D.C. Cir. 2014).

meaningless, yet somehow *essential* to the government's contraceptive/abortifacient program. And to the extent the government and lower courts are second-guessing Petitioners' theological, moral judgment about moral complicity and facilitation of evil, courts should not be in the business of telling nuns, seminaries, and religious colleges how to engage in moral theology.

This is not just an abstract, intellectual debate. Embracing the lower courts' errors would have serious ramifications for organizations like Petitioners and, in turn, on society, particularly on the needy and the vulnerable. If these groups are unable to kowtow to the mandate and thus shut down their operations, in order to remain true to their religious beliefs, the poor and needy will suffer a tangible loss.

Thousands of nonprofits abide by the Catholic Church's "well-established teaching that prohibits encouraging, supporting, or partnering with others in the provision of sterilization, contraception, and abortion."[6] They believe that, to be consistent with their religious beliefs, they "cannot provide these things, take actions that directly cause others to provide them, or otherwise appear to participate in the government's delivery scheme."[7] Other Christian organizations have similar moral and religious beliefs.[8] As a result, these organizations are being pressured by the government

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[6] *Little Sisters*, 794 F.3d at 1167.

[7] *Id.*

[8] *See East Texas*, 793 F.3d at 444–45; *Little Sisters*, 794 F.3d at 1167–69 (referring to the beliefs of Petitioners Southern Nazarene and Reaching Souls).

to abandon the very religious beliefs and commitments that inspire them to provide help to the helpless in the first place.

Petitioners perform work to better the lives of countless individuals and families, and many are only able to do so with the assistance of the Catholic Church. Some of them participate in diocesan sponsored health plans, and are faced with a particularly difficult situation. Rejecting the government's and lower courts' attempted interpretation of their own moral beliefs, they will be forced to bear the substantial burden of the penalties in order to preserve their consciences. And even those objectors who yield and violate their beliefs will face substantial negative consequences. They may no longer be able to form key partnerships with other charitable operations. For example, a number of Catholic dioceses have indicated that they will be forced to remove such organizations from group healthcare plans in order to preserve their Catholic and religious identity.[9] Either outcome is likely to end, or seriously hamper, their charitable efforts.

While the Little Sisters of the Poor, for example, have a self-funded plan with the Christian Brothers as their third party administrator, they and hundreds of

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[9] *East Texas*, 793 F.3d at 455 n.23, 455 n.25 ("The diocese is a plaintiff because it alleges that the regulations will require it either to sponsor a plan that complies with the mandate or to remove Catholic Charities from its plan."); *Geneva College*, 778 F.3d at 443 ("Further, any nonprofit, religious affiliated/related organizations expelled from the Dioceses' health insurance plans would require significant restructuring of the plans which would adversely affect the benefits received from pooling resources.").

other Catholic organizations will not be able to afford the financial penalties imposed on them for failing to comply with the mandate. They thus face an impossible choice, placing at risk the essential charitable work of nearly 500 Catholic non-profit organizations:

> Collectively, unless these ministries give up their religious exercise, they could face fines exceeding $400 million over the course of [one year]. These non-profit ministries—which provide needed social services like educating children, feeding the hungry, caring for the sick, and comforting the old and the dying—could not possibly endure such massive daily fines over time, meaning the fines will likely force them to either give up their religious exercise (surely an irreparable harm) or to *close under the weight of the fines* [10]

Such closings would prove devastating not only for religious charities but for American civic life.

The First Amendment protects the right of all Americans to religious freedom and RFRA was enacted "to provide very broad protection for religious liberty" *Burwell v. Hobby Lobby Stores*, Inc., 134 S. Ct. 2751, 2760 (2014). This right has done more than protect the individual conscience of believers; it has enabled religious nonprofits of all faiths and denominations to establish themselves in their communities to carry out works of charity and mercy. These parallel legacies of religious liberty and charity have existed as part of our

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[10] *Little Sisters of the Poor Home for the Aged, Denver, Colorado v. Sebelius*, Emergency Application for Injunction Pending Appellate Review (Dec. 31, 2013), at 16.

national fabric since before the Revolutionary War, and they continue to this day. These are quintessential American values that together have helped to sustain local communities and inculcate civic virtue.

I. Religion and Religious Nonprofits Promote Charity, Civic Virtues, and Good Citizenship Essential to Any Society.

From the time of our first president, leaders of this country have consistently recognized that religion plays a critical role in the life of a democracy. As George Washington eloquently put it in his famous Farewell Address:

> Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism, who should labor to subvert these great pillars of human happiness, these firmest props of the duties of men and citizens. The mere politician, equally with the pious man, ought to respect and to cherish them. A volume could not trace all their connections with private and public felicity. Let it simply be asked: Where is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths which are the instruments of investigation in courts of justice?[11]

Even when President Obama announced the administration's first attempt to allay the concerns of religious organizations rightly offended and outraged

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[11] President George Washington, Farewell Address (1796).

by the imposition of the contraceptive mandate, he recognized the important role religious nonprofits play in serving local communities:

> Now, as we move to implement this rule, however, we've been mindful that there's another principle at stake here -- and that's the principle of religious liberty, an inalienable right that is enshrined in our Constitution. As a citizen and as a Christian, I cherish this right. In fact, my first job in Chicago was working with Catholic parishes in poor neighborhoods, and my salary was funded by a grant from an arm of the Catholic Church. And I saw that local churches often did more good for a community than a government program ever could, so I know how important the work that faith-based organizations do and how much impact they can have in their communities.[12]

Amicus urges this Court to consider carefully that impact, which cannot be overstated. Studies have shown time and again that involvement in religious organizations and involvement in religious networks are by far the greatest predictors of philanthropic generosity and civic involvement.[13] Research shows

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[12] President Barack Obama, *Remarks by the President on Preventive Care* (Feb. 10, 2012), https://www.whitehouse. gov/the-press-office/2012/02/10/remarks-president-preventive-care.

[13] *See, e.g.*, Christopher Toppe, *et al.*, *Giving and Volunteering in the United States: Findings from a National Survey*, *in* THE GIVING AND VOLUNTEERING IN THE UNITED STATES 2001 SIGNATURE SERIES (Independent Sector, 2001); The Panel Study of American Religion and Ethnicity, http://www.ps-are.org/index.asp. *See generally*

that religious Americans are generally more altruistic neighbors and tend to be more conscientious citizens than their secular counterparts. Holding constant for all other demographic predictors of volunteering (including gender, education, income, race, region, homeownership, length of residence, marital and parental status, ideology, and age) the research findings are simply remarkable.

A. *Religion promotes charitable giving and volunteering across both religious and secular nonprofit organizations.*

Over one-third of all volunteering in America is done for religious organizations.[14] Perhaps more importantly, of all people who volunteered for a religious group, *over 90 percent* also volunteered for at least one secular group—making them two to three times more likely to volunteer for secular groups than people who do not volunteer for religious groups.[15] In the Giving and Volunteering surveys from 1988-2001, 45 percent of weekly churchgoers report nonreligious volunteering in addition to their religious volunteering,

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GIFTS OF TIME AND MONEY: THE ROLE OF CHARITY IN AMERICA'S COMMUNITIES (Arthur C. Brooks ed. 2006).

[14] Other research, including the 2006 Faith Matters survey, suggests that the number is even higher. *See* INTERNATIONAL COMMUNICATIONS RESEARCH, FAITH MATTERS SURVEY (Robert D. Putnam & David E. Campbell eds., 2006).

[15] Robert D. Putnam and David E. Campbell, AMERICAN GRACE: HOW RELIGION DIVIDES AND UNITES US (2010) ("Putnam"), at 445.

while only 26 percent of non-church-goers volunteer for anything at all.[16]

Compared to a typical once-a-year churchgoer, the average weekly churchgoer volunteers an extra 10.5 hours a month for religious causes and 6.4 hours more for secular causes.[17] This difference is especially marked for service to poor, elderly, and young people.

In terms of charitable giving, the findings are even clearer: giving to religious charities is strongly and positively correlated to giving to secular charities and organizations. Amongst the most secular fifth of the population, nearly one-third (32 percent) admitted that they had made no charitable contributions to any cause in the last year. Amongst the most religious fifth, that number was only six percent.[18] Measured in charitable giving as a fraction of annual income, the average person in the most religious fifth is more than four times as generous as his or her counterpart in the most secular fifth.[19]

88 percent of givers to religious causes also gave to secular causes, while 60 percent of those who did not give to any religious causes did not give to any secular causes, either. Again, looking at giving as a fraction of income, 70 percent of above-average givers to religious causes are also above-average givers to secular causes, while 67 percent of below-average givers to religious

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[16] *Id.* at 446

[17] *Id.*

[18] *Id.* at 447

[19] *Id.* at 448

causes are also below-average givers to secular causes.[20] All of these statistics hold even though regular churchgoers tend to be slightly disproportionately poorer.[21] While virtually every part of the American philanthropic spectrum benefits disproportionately from giving by religious observant people, this is especially true for organizations serving the vulnerable and the needy.[22]

The 2006 panel study of American Religion and Ethnicity (PS-ARE)[23] also found that religiosity predicts many sorts of informal altruism, entirely outside of organizational contexts. For example, surveys have shown that churchgoers are significantly likelier to give money to strangers,[24] family, and friends.[25]

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[20] For both of these comparisons, the results from the Giving and Volunteering Survey archives and the Faith Matters survey are almost identical. *See* GIVING AND VOLUNTEERING, *supra*; INTERNATIONAL COMMUNICATIONS RESEARCH, *supra*; Putnam, *supra*, at 448 n.11.

[21] *Id.*

[22] Putnam, *supra*, at 450.

[23] Note that this survey has since been renamed the Portrait of American Life Survey (PALS) not PS-ARE, http://www.thearda.com /Archive/PALS.asp.

[24] *Id.* at 451.

[25] *Id.* They were also more likely to give money to a charity, do volunteer work for a charity, give money to a homeless person, donate blood, help someone outside their own household with housework, spend time with someone who is down, and help someone find a job. The survey did not find a single type of good deed that is more common among secular Americans than religious Americans. *Id.*

B. *Religion inculcates a commitment to civic involvement.*

Religion and the social networks and organizations surrounding it are crucial in transmitting civic norms and habits. In fact, religious Americans are up to twice as active civically as secular Americans. Religiosity is by far the strongest and most consistent predictor of a wide range of measures of civic involvement, such as belonging to a community organization, especially a health-related one, youth-serving organizations, neighborhood and civic associations, fraternal and service organizations, and even professional and labor groups.[26]

Likewise, religion energizes community problem-solving and promotes active community leadership, including participation in local government and political activism. Of the most religious fifth of the population, 29 percent said they had served as an officer or committee member of some organization, compared to only 14 percent for the most secular fifth. Likewise, 20 percent of religious Americans say that they are a member of some organization that took local action for social or political reform in the last 12 months, as compared to 11 percent of secular Americans.[27]

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[26] Putnam, *supra*, Ch. 13.

[27] *Id.* at 454–56.

C. *The benefits of religion are not limited by theology, political persuasion, or nationality.*

Those who might be concerned about policies which on their face look like state support for religion should not fear. Research has proven that the primary predictor of generosity and civic involvement is actually less about religion *per se* and more about involvement in religious networks.[28] Theology is not the core explanation for these phenomena. Differences in generosity across religious traditions are quite modest compared to the basic effect of religiosity itself,[29] and while many Americans have strong particular theological or denominational commitments, studies find that none of them correlate with the above-mentioned measures of good neighborliness. The only thing that matters is whether or not they were part of a religious community and involved in religious networks.

With comprehensive demographic and ideological controls, it turns out that actual doctrinal religiosity itself is not a significant predictor for all of these measures of good neighborliness. In virtually every case, what matters is simply the religious network. Statistics even suggest that an atheist who happens to become involved in a religious network is more likely to

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[28] *Id.* at 474–76.

[29] *Id.* at 453 (citing to Faith Matters survey, Giving and Volunteering Surveys, and PS-ARE survey).

volunteer at a secular soup kitchen than a devout believer who is not part of a religious social network.[30]

The effect also seems to be causal. By examining how respondents changed over time, surveys found that controlling for all other factors, people who became more closely involved with religious networks over time became better citizens and more generous neighbors, while those whose involvement dropped became less so.[31]

Religious networks are about people working together for a common cause, and religious nonprofits are just that. Religiously rooted social networks in America, including those sustained by Petitioners, "have a powerful effect in encouraging neighborliness and civic engagement."[32] They lead people to focus outward and not inward, and they do this by creating "a web of interlocking personal relationships among people of many different faiths,"[33] and people of no faith at all.

Government support for and *a true accommodation of* the autonomy of religious networks, and religious nonprofits in particular, is a permissible and extremely

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[30] Putnam, *supra*, at 465-473, with information independently confirmed in the PS-ARE survey and the Giving and Volunteering surveys. *See also* Robyn L. Driskell, Larry Lyon, and Elizabeth Embry, *Civic engagement and religious activities: Examining the influence of religious tradition and participation*, SOCIOLOGICAL SPECTRUM 28, no. 5 (2008): 578-601 (cited in Putnam at 635).

[31] *Id.*

[32] Putnam, *supra*, at 478.

[33] *Id.* at 550

practical way of supporting activities that lead to great secular benefits. While research has shown that even just "bowling in a church league"[34] is likely to have a positive impact on persons, and to make them better citizens, how much more so if they become involved in a religious network like that provided by the Little Sisters of the Poor, founded on, and committed to, the notion of charity itself.

Finally, the benefits of religion are not exclusively an American phenomenon. In recent studies, Gallup has found a similar connection between religion and civic engagement, including giving, volunteering, and helping strangers, around the world.[35]

D. *Religious nonprofit organizations promote religious liberty, diversity, and social cohesion.*

A byproduct of religious liberty has been the growth of an active and pluralistic nonprofit sector including a wide variety of religions, faiths, and denominations. The continued engagement of individuals in this thriving sector promotes diversity and social cohesion, and gives Americans across the board the opportunity for engagement in a religious network, with all of the associated benefits to themselves and to society

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[34] *Id.* at 475

[35] Brett Pelham & Steve Crabtree, *Worldwide, Highly Religious More Likely to Help Others*, GALLUP (Oct. 8, 2008), http://www.gallup.com/poll/111013/worldwide-highly-religious-more-likely-help-others.aspx.

A full 84 percent of Americans see religious diversity as good for America.[36] The way that most Americans bridge gaps and promote diversity is through social capital—those norms of trust and reciprocity that arise out of our shared social networks. Religious diversity amongst social networks promotes and fosters greater religious acceptance and tolerance. When Americans associate with people of faiths other than their own, they become more accepting of others.[37] As Robert Putnam explains it, "How has America solved the puzzle of religious pluralism, the coexistence of religious diversity and devotion? And how has it done so in the wake of growing religious polarization? By creating a web of interlocking personal relationships among people of many different faiths. This is America's grace."[38] Organizations like the Little Sisters of the Poor, whose mission statement is "to offer the neediest elderly of *every race and religion* a home,"[39] are particularly graceful and deserving of protection.[40]

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[36] Putnam, *supra*, 520.

[37] *Id.* at Ch. 15.

[38] *Id.* at 550.

[39] *Little Sisters of the Poor: Our Mission Statement*, http://www.littlesistersofthepoor.org/ourmission/misison-statement (emphasis added).

[40] Indeed, religious beliefs, sustained and advanced by religious institutions, promote goods and benefits across the board, including to those with no religious beliefs. The following colloquy between Justice Scalia and the attorney representing Respondent in *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) makes the point:

II. Religious Nonprofit Social-Welfare Services Supplement Burdened Government Programs.

President George Herbert Walker Bush famously spoke of volunteerism throughout the country as a thousand points of light: "we are a nation of communities, of thousands and tens of thousands of ethnic, religious, social, business, labor union, neighborhood, regional and other organizations—all of them varied, voluntary and unique a brilliant diversity spread like stars, like a thousand points of light in a broad and peaceful sky."[41]

As researcher Robert K. Landers has noted,

> Non-profit organizations—the "thousand points of light" to which President-elect George Bush referred play a distinctive role in American society. They are private organizations that perform public services. Their number is actually in the hundreds of thousands, but they are indeed diverse—ranging from hospitals to

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> QUESTION: it used to be thought that -- that religion -- it didn't matter what religion, but it -- some code of morality always went with it and it was thought that, you know, what was called a God-fearing person might be less likely to mug me and rape my sister. That apparently is not the view of New York anymore.
> MR. HOEFLING: Well, I'm not sure that that's -- that --
> QUESTION: Has this new regime worked very well?

1992 U.S. Trans. LEXIS 149, *48-49.

[41] George Herbert Walker Bush acceptance speech, Republican National Convention (Aug. 18, 1988), http://library.cqpress.com/cqresearcher/document.php?id=cqresrre1988122300.

> daycare centers, from symphony orchestras to groups that assist the elderly, from universities to churches and synagogues.[42]

Religiously based organizations and networks are by far the greatest predictors of philanthropic generosity and civic involvement.[43] Research shows that religious Americans are generally more altruistic neighbors and more conscientious citizens than their secular counterparts. Overall, the bulk of charitable donations made in the United States are made to religious congregations and organizations.[44] Of the $358.38 billion given in private charitable contributions in 2014, 32 percent were made to congregations and religious organizations, with the next highest share being 15.2 percent to educational organizations.[45] Among the top 50 largest U.S. charities are religious organizations like Catholic Charities USA, Salvation Army, St. Jude's Research Hospital, and Lutheran Services in America.[46]

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[42] Robert K. Landers, *Philanthropy: The season for giving*, EDITORIAL RESEARCH REPORTS (1988).

[43] Putnam, *supra*, Ch. 13.

[44] Between 2008 and 2013, religiously affiliated charities received as much as one-third of all charitable donations made in the United States. Brian S. McKeever & Sarah L. Pettijohn, *The Nonprofit Sector in Brief 2014*, URBAN INSTITUTE 11 (Oct. 2014), http://www.urban.org/sites/default/files/alfresco/publication-pdfs/413277-The-Nonprofit-Sector-in-Brief--.PDF

[45] *Id.* at 4.

[46] *The 50 Largest U.S. Charities 2015*, FORBES, http://www.forbes.com/top-charities/list/ (last visited Dec. 30, 2015).

These charities and those like them have a long history of using public money for the benefit of at risk and needy populations.[47] This long history of community service places religious charities in a unique position to "play a critical role to fill in the gaps that are increasingly beginning to show in the social welfare net."[48]

Much of the charitable donations made in the United States are through religious organizations. Moreover, public charities contribute nearly $887.3 billion dollars to the United States economy.[49] Religious organizations make up over two-thirds of those public charities in the United States.[50]

The impact of these religious nonprofits is not limited to their work in their local communities. Religious nonprofits play a vital role in fulfilling the United States' mission of charity around the globe. As a group, they deliver "more aid than the whole United Nations."[51] Moreover, U.S. based religious nonprofits

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[47] Charles J. Chaput, *A Charitable Endeavor*, FIRST THINGS (Nov. 2009), http://www.firstthings.com/article/2009/11/a-charitable-endeavor.

[48] John Witte Jr., *Religious views should be welcomed in our public life*, FAITH & LEADERSHIP (Oct. 8, 2012), https://www.faithandleadership.com/qa/john-witte-jr-religious-views-should-be-welcomed-our-public-life.

[49] McKeever, *supra*, at 1.

[50] *Id.* at 6.

[51] Elizabeth Ferris, *Faith-based and secular humanitarian organizations*, 87 INT'L REVIEW OF THE RED CROSS 311, 312 (June 2005), https://www.icrc.org/eng/assets/files/other/irrc_858_ferris.pdf.

have a long history of international community service.[52] For example: "The World Council of Churches (WCC) was formed in 1948 as a fellowship of churches, but much of its programmatic work in its early years was concerned with responding to humanitarian need, particularly the needs of Europe's displaced millions. Since then, church based organizations have "channeled millions of dollars to churches and related organizations in support of local church work with the poor and with victims of wars and other disasters."[54]

Moreover, they have played an essential role in the expansion, development, and protection of human rights in international law.[55] Specifically, the WCC actively lobbied for the establishment of the United Nations and led the call for the inclusion of human rights references into the UN Charter.[56]

Religious organizations that provide social services have a quantifiable impact on the public good. Research shows that roughly 87 percent of charitable congregations provided support or other services in activity areas that the researchers defined as being

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[52] *Id.* at 313–15.

[53] *Id.* at 314.

[54] *Id.* at 315.

[55] *Id.*

[56] *Id.*

concerned with human services and welfare.[57] As Brian O'Connell has stated, "[a] very large part of the nonprofit sector's service to society is performed by religious institutions dwarfing all funds contributed to and by other voluntary organizations for local human services."[58] The Invisible Caring Hand Survey, performed by the University of Pennsylvania from 1996-99,[59] revealed that 92 percent of these charitable organizations were involved in helping others. 75 percent of charitable organizations included in the survey were involved in providing financial help directly to individuals. Two major studies to quantify value of caring activities by charitable organizations were examined in *Civic Involvement Survey* from 1997[60] and *Religion and Politics Survey* from 2000.[61] Both studies showed that membership in religious organizations improves perception of social needs and conduct necessary to help with those needs.

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[57] Virginia Ann Hodgkinson *et al.*, *From Belief to Commitment: The Activities and Finances of Religious Congregations in the United States: Findings from a National Survey*, INDEPENDENT SECTOR 18 (1988).

[58] *Id.* at iii.

[59] Ram Cnaan, THE INVISIBLE CARING HAND: AMERICAN CONGREGATIONS AND THE PROVISION OF WELFARE (Aug. 1, 2002).

[60] Robert Wuthnow, CIVIC INVOLVEMENT SURVEY (1997).

[61] Robert Wuthnow, RELIGION AND POLITICS SURVEY (2000).

III. A Rejection of Petitioners' RFRA Claim Will Negatively Impact Nonprofits and Those Who Depend on Them.

A ruling against Petitioners' RFRA claim in this case will trigger a domino effect that will cost the religious nonprofit sector hundreds of millions of dollars a year and prevent these charities from filling key gaps in services on which the poor and needy depend. The Little Sisters of the Poor alone will suffer a loss on the order of $2.5 million every year for each retirement home.[62] At St. Martin's Home for the Aged in Colorado, the annual budget is nearly $8 million with half of that coming from begging.[63] The Little Sisters have a distinct tradition of begging for their funding.[64] They have at least thirty-one homes operating across three states that all observe the tradition of begging.[65] Additionally, their group health plan's trust could lose as much as $130 million.[66] This does not include the $100 per employee per day cost that Southern Nazarene University, Reaching Souls, Truett-McConnell College, and other Petitioners will

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[62] *Little Sisters*, 794 F.3d at 1167.

[63] George P. Matysek Jr., *Little Sisters of the Poor stand firm against mandate*, CATHOLIC REVIEW (Jan. 13, 2014), http://www.catholicreview.org/article/home/little-sisters-of-the-poor-stand-firm-against-mandate.

[64] *Little Sisters of the Poor: Tradition of Begging*, http://www.littlesistersofthepoor.org/ourmission/tradition-of-begging.

[65] *Little Sisters of the Poor: Directory of Homes*, http://www.littlesistersofthepoor.org/resources/our-homes-directory.

[66] *Little Sisters*, 793 F.3d at 1167.

have to bear.[67] Nor does it include the hundreds of other nonprofit and religious charities who are awaiting the outcome of this case. A ruling against Petitioners in this case has, therefore, the potential to decimate charity work in the United States, severely restricting what they provide to millions of needy Americans each year.

Religious nonprofits associated with Catholic dioceses will likely be removed from their current group plans. Indeed, several dioceses have intimated that compliance with the mandate would put them in violation of their beliefs, and that to protect themselves and the integrity of their doctrine, they would need to remove those nonprofits from their health plans.[68] This will eliminate cost-sharing benefits provided to employees who work for such nonprofits, greatly increasing their healthcare costs. Attempting to force these organizations to comply with a secular understanding of their own beliefs will not only hurt hardworking service providers, but also the same people the government claims it wants to protect.

Moreover, due to the prospect of crippling penalties, these religious nonprofits will be forced to curtail their social services or eliminate them entirely, creating gaps in the social welfare system and leaving vulnerable populations at risk. The Catholic Church, through its dioceses and various religious nonprofits, operate schools, local charities, after-school programs, and more. One of the largest charities in the United States, Catholic Charities USA, serving nearly eight million

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[67] *Id.* at 1169.

[68] *East Texas*, 793 F.3d at 455, nn. 23 and 25.

people a year, is just one of the nonprofits that will be adversely affected by this ruling.[69] Likewise, state-based subsidiaries of Catholic Charities are generally among the largest providers of social services.[70] Providing such extensive social services costs money, and these organizations already operate on shoestring budgets, relying heavily on volunteers. Forcing them to choose between their faith and their charitable work, and imposing burdensome penalties to the tune of millions of dollars, will only harm their ability to provide vital social services.

Therefore, while the government may argue that the contraceptive mandate, along with the current "accommodation," is necessary, and while the lower courts may render theological judgments that the "accommodation" does not make religious nonprofits like the Little Sisters morally complicit in violating their beliefs, Petitioners in this case will act as *they* believe their conscience and faith require. This Court's decision will therefore determine the availability of vital gap-filling social service programs essential to the health and wellness of at risk populations.

While it is true that the Little Sisters of the Poor are guided by a religious creed that is exemplified by their tradition of charity, the work they do is for people of all faiths and beliefs.[71] In addition to their vows of chastity, poverty, and obedience, they take a vow of hospitality that spiritually and physically manifests

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[69] Chaput, *supra*.

[70] *Id.*

[71] *Little Sisters of the Poor: Our Mission Statement*, http://www.littlesistersofthepoor.org/ourmission/misison-statement.

itself in the selfless work they do every day.[72] The same religious values that have ingrained in them a spirit of charity that much of the world is devoid of are the same values that place them at odds with their government. From the perspective of the Little Sisters, they are torn between upholding the law of the land in which they work and the law of God that supports them in all their endeavors. The resulting dilemma jeopardizes the future of a group whose mission is to help those who are too old and too poor to help themselves. As the Little Sisters themselves state, "Through our vow of hospitality the Church has given us a mandate to prolong Christ's mission of charity—to convey to the elderly, in the concrete realities of everyday life, the kindness and love of God for them, his eldest children."[73] It is those concrete realities of life that concern the Little Sisters and those they care for. Denying the Little Sisters, and all Petitioners, relief from the mandate, as RFRA requires, puts in peril their work and the lives of those they serve.

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[72] *Little Sisters of the Poor: Vow of Hospitality*, http://www.littlesistersofthepoor.org/index.php/ourmission/vow-of-hospitality.

[73] *Id.*

CONCLUSION

For the foregoing reasons, the judgments of the Third, Fifth, Tenth and D.C. Circuits should be reversed.

Respectfully submitted,

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